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GREYSTONE NEVADA, LLC and
U.S. HOME CORPORATION
8

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 GREYSTONE NEVADA, LLC, an Delaware
12 limited liability company and U.S. HOME
13 CORPORATION, a Delaware Corporation,

14 Plaintiffs,

15 vs.

16 ANTHEM HIGHLANDS COMMUNITY
ASSOCIATION, a Nevada non-profit
corporation; and DOE HOMEOWNER
ASSOCIATIONS 1-100; and DOE
HOMEOWNERS 101-5000, inclusive,

17 Defendants.
18

CASE NO.: 2:11-cv-1424-RCJ-CWH

19
20 **GREYSTONE NEVADA, LLC AND U.S.
HOME CORPORATION'S REPLY IN
SUPPORT OF THEIR MOTION TO
COMPEL ARBITRATION**

21 COME NOW, GREYSTONE NEVADA, LLC and U.S. HOME CORPORATION , by and
22 through their counsel of record PAYNE & FEARS, LLP, and hereby submit this Reply in support
23 of their Motion (#7) petitioning this Honorable Court for an order compelling certain homeowner-
24 members of Defendant, the ANTHEM HIGHLANDS COMMUNITY ASSOCIATION to arbitrate
25 the disputes which are the subject of this action, pursuant to the governing arbitration agreements
26 entered into between Plaintiffs and Defendant's homeowner-members, whom Defendant purports
to represent, and pursuant to the Federal Arbitration Act 9 U.S.C. §§ 1, *et seq.*

27 This Reply is made and based upon the Points and Authorities filed concurrently herewith,
28 all pleadings and papers on file herein, and such oral argument as may be heard.

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1 DATED: November 14, 2011 PAYNE & FEARS LLP

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13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 The most noteworthy aspect of the ANTHEM HIGHLAND COMMUNITY
16 ASSOCIATION's (hereinafter "HOA") "limited" Response (#12) to GREYSTONE NEVADA
17 LLC and U.S. HOME CORPORATION's (hereinafter collectively, "Lennar") Motion to Compel
18 Arbitration (#7) is what it does NOT address. It does not argue or suggest that Lennar has failed
19 to meet its evidentiary burden in establishing the existence of the arbitration agreements at issue in
20 Lennar's Motion. The HOA does not argue that the terms contained in these agreements are
21 invalid, unconscionable or unenforceable in any way. Neither does the HOA suggest that its
22 yellow brass claim falls outside the scope of these agreements. Instead of addressing the actual
23 merits of Lennar's Motion, the HOA has unilaterally decided that these issues do not need to be
24 addressed until the merits of its Motion to Dismiss (#10) have been decided, which Motion was
25 filed eleven days after Lennar's Motion to Compel Arbitration. However, the HOA's insistence
that "[t]his Court cannot hear, let alone determine, the merits of Greystone's Motion"¹ and its bold
assertion that "this Court must defer further briefing and hearing on the merits of Greystone's
Motion until ... Anthem Highland's pending motion to dismiss ... [has] been resolved"² are
incorrect and contrary to the law.

26 To be clear, Lennar's Motion to Compel Arbitration is a direct petition to this Court under

27

28 ¹ HOA's Limited Response to Lennar's Motion to Compel Arbitration (#12) at 2:14-15, 3:7-8.
² *Id.* at 3:5-7.

1 Section 4 of the Federal Arbitration Act (“FAA”)(9 U.S.C.A. §1, *et seq.*) which must be
 2 “summarily” decided by this Court. Lennar’s Motion stands independent from the claims and
 3 allegations asserted in its Complaint. In other words, a proper and valid complaint is not a
 4 prerequisite or condition upon which Lennar’s Motion rests. In fact, most of the issues set forth in
 5 Lennar’s Complaint for declaratory and injunctive relief are separate and distinct from those raised
 6 by Lennar’s Motion to Compel Arbitration. Accordingly, the FAA requires that the “court shall
 7 proceed summarily” in determining issues of arbitrability and not wait to resolve issues raised by
 8 the HOA’s separate Motion. *See*, 9 U.S.C.A. § 4.

9 As set forth in detail below, the limited arguments set forth in the HOA’s Response to
 10 Lennar’s Motion are without merit. Accordingly, this Court is required to issue an order
 11 compelling arbitration as requested by Lennar.

12 II. LEGAL ARGUMENT

13 A. **LENNAR’S MOTION FOR AN ORDER COMPELLING 14 ARBITRATION MUST BE DECIDED SUMMARILY, SEPARATE AND 15 APART FROM LENNAR’S OTHER CLAIMS FOR RELIEF.**

16 In its “limited” response to Lennar’s Motion to Compel Arbitration, the HOA almost
 17 completely defers to the arguments it asserts in its Motion to Dismiss Lennar’s Complaint on file
 18 herein. The HOA suggests that there is a question as to whether this Court has jurisdiction over
 19 “this action,” that jurisdiction is “discretionary” and should be declined in this “Nevada-law-based
 20 declaratory relief action,” and that Lennar’s Complaint contains “substantial pleading errors.”³
 21 With the exception of whether proper subject matter jurisdiction has been invoked under Title 28,
 22 discussed below, none of these arguments are relevant to Lennar’s Motion to this Court pursuant
 23 to §4 of the FAA for an order compelling arbitration. Lennar’s Complaint filed in this action is
 24 separate and independent from Lennar’s Motion to Compel Arbitration. Thus any alleged
 25 “pleading errors” within the Complaint or issues regarding Lennar’s separate, alternative claims
 26 for declaratory and injunctive relief are irrelevant to the instant Motion to Compel Arbitration.

27 Lennar’s Motion to Compel Arbitration constitutes an independent petition under § 4 of
 28 the FAA, and must be considered by this Court separately from the claims within Lennar’s

³ *See, Id.* at (#12) at 3:14-23.

1 Complaint and the HOA’s Motion to Dismiss the same. *See*, 9 U.S.C.A. §6 (“Any application to
 2 the court hereunder, shall be made and heard in the manner provided by law for the making and
 3 hearing of motions . . . ”) A petition to compel arbitration can be made independent of any
 4 underlying lawsuit. *See, Countrywide Home Loans, Inc. v. Mortgage Guaranty Ins. Corp.*, 642
 5 F.3d 849, 855, fn2 (9th Cir. 2011)(“If [the defendant] . . . had brought directly to federal court a
 6 petition under § 4 of the FAA that was unattached to [the plaintiff’s] declaratory suit, . . . the
 7 district court’s diversity jurisdiction would allow it to consider the merits of this petition.”).
 8 Section 4 of the FAA contemplates a direct motion for an order compelling arbitration and does
 9 not require that such motion be attached to a lawsuit or any other cause of action:

10 A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate
 11 under a written agreement for arbitration may petition any United States district
 12 court which, save for such agreement, would have jurisdiction under Title 28, in a
 13 civil action . . . of the subject matter of a suit arising out of the controversy between
 14 the parties, for an order directing that such arbitration proceed in the manner
 15 provided for in such agreement. . . . The court *shall* hear the parties, and upon being
 16 satisfied that the making of the agreement for arbitration or the failure to comply
 17 therewith is not in issue, the court *shall* make an order directing the parties to
 18 proceed to arbitration in accordance with the terms of the agreement. [Emphasis
 19 added].

20 Thus, the HOA’s arguments concerning the propriety of Lennar’s declaratory and injunctive relief
 21 claims or the sufficiency of the pleadings within Lennar’s Complaint are irrelevant to this Court’s
 22 disposition of Lennar’s Motion to Compel Arbitration.

23 Further, the FAA requires that Lennar’s Motion to Compel Arbitration be “summarily”
 24 decided. Section 4 of the FAA provides that “[i]f the making of the arbitration agreement or the
 25 failure, neglect, or refusal to perform the same be at issue, *the court shall proceed summarily to*
 26 *the trial thereof . . . [and] shall make an order summarily directing the parties to proceed with the*
 27 *arbitration* in accordance with the terms thereof.” [Emphasis added]. As recognized by the U.S.
 28 Supreme Court, “Congress’s clear intent, in the Arbitration Act, [was] to move the parties to an
 arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Moses H.*
Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 22, 103 S.Ct. 927 (1983).
 Section 4’s mandate for an affirmative order to engage in arbitration “call[s] for an expeditious

1 and summary hearing, with only restricted inquiry into factual issues.” *Id.*

2 Here, because the HOA has not opposed the validity or enforceability of the terms of the
 3 arbitration agreements, the Court must promptly issue an order directing the parties to arbitration
 4 once it has resolved the jurisdictional issues discussed below.

5 **B. IN ITS “LIMITED” RESPONSE, THE HOA DOES NOT DISPUTE THAT
 6 LENNAR HAS MET ITS BURDEN UNDER THE FAA.**

7 As discussed within Lennar’s Motion to Compel Arbitration, § 4 of the FAA directs that an
 8 order compelling arbitration shall be entered upon a showing that (1) there exists a written
 9 arbitration agreement, and (2) the party bound by the arbitration agreement has failed, neglected or
 10 refused to arbitrate. *See, 9 U.S.C.A. §4.* The HOA’s “limited” response to Lennar’s Motion to
 11 Compel Arbitration does not dispute that Lennar has met its burden under §4 of the FAA. The
 12 HOA does not challenge the sufficiency of Lennar’s production of a summary, pursuant to Fed. R.
 13 Evid. 1006, of the HOA’s homeowner members who entered into arbitration agreements, or the
 14 production of true and correct exemplar agreements. In fact, although each and every arbitration
 15 agreement which was the subject of Lennar’s Motion was specifically made available to counsel
 16 for the HOA for inspection, copying or both, counsel for the HOA did not request to inspect the
 17 documents prior to filing its “limited” response.⁴

18 Similarly, the HOA does not challenge the fact that the HOA and its homeowner-members
 19 have failed, neglected or refused to arbitrate in response to Lennar’s demand for arbitration.⁵
 20 Because neither the making of the written arbitration agreements nor the failure, neglect or refusal
 21 by the HOA and its homeowner-members to comply is at issue, an order compelling arbitration is
 22 proper under §4 of the FAA.

23 As is clear from Lennar’s Motion, it is limited to certain homeowner-members within the
 24 Clermont, Earlstone and Glengarry subdivisions of the Anthem Highlands community who signed
 25 arbitration agreements as original homeowners and who still own the homes that are the subject of
 26 such agreements. Lennar notes that within its Motion to Dismiss Lennar’s Complaint, the HOA

27 ⁴ See, October 28, 2011 Letters to Terry Riedy from Payne & Fears, submitted herewith as Exhibit “1.”

28 ⁵ See, September 2, 2011 Letters to Terry Riedy from Payne & Fears forwarded on behalf of Greystone and U.S.
 Home, respectively, submitted herewith as Exhibit “2” and “3.”

1 attempts to manufacture some confusion regarding which of the homeowners represented by the
 2 HOA Lennar seeks to compel to arbitration. Though this argument is not made in the HOA's
 3 "limited" Response, Lennar anticipates that the HOA may attempt to raise a similar argument if
 4 oral argument is heard on this Motion.

5 There is no ambiguity. Lennar's Motion seeks to compel the homeowners within the
 6 Clermont, Earlstone and Glengarry communities, identified in Exhibits "D," "E," and "F," to the
 7 Affidavit of Heather R. Thompson, to arbitration. Exhibits "D," "E," and "F" to Ms. Thompson's
 8 Declaration identify the addresses of the homes within the Clermont, Earlstone and Glengarry
 9 communities for which the still current owners signed arbitration agreements with Lennar. Each
 10 of the owners of these homes are original and current members of the HOA and are being
 11 represented in this action. In short, each of the persons identified on Exhibits "D," "E" and "F" to
 12 Ms. Thompson's Affidavit are original and *current* homeowners of the properties at issue.

13 Nonetheless, in an effort to eliminate any possible confusion, Lennar has attached to this
 14 response an Affadavit of Nancy Babas, which confirms that the homeowners within the Clermont,
 15 Earlstone and Glengarry communities identified on Exhibits "D," "E," and "F," respectively, are
 16 current owners of record of the properties identified therein. As set forth in that Affadavit, the
 17 Affiant has reviewed the public records set forth on the Clark County's Assessor website and
 18 determined that as of October 20, 2011, the date on which Lennar filed its Motion, the
 19 homeowners set forth in Exhibits "D," "E," and "F" to the Affidavit of Heather R. Thompson,
 20 owned the properties identified therein.⁶

21 **C. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THE
 22 HOA's UNDERLYING CLAIM AGAINST LENNAR.**

23 Section 4 of the FAA states that a party may file a petition thereunder with a United States
 24 district court which, "would have jurisdiction under Title 28, in a civil action ... of the subject
 25 matter of a suit arising out of the controversy between the parties." As set forth within the HOA's
 26 NRS 40 Notices to Lennar in this matter, the notices were forwarded by "the *Anthem Highlands*
 27 *Community Association*, individually and in its representative capacity on behalf of its members,

28 ⁶ See, Declaration of Nancy Babas, attached hereto as Exhibit "4."

1 as well as on behalf of similarly situated homeowners associations in the Las Vegas Valley⁷
 2 The Notices further state that “[t]he purpose of the Notice is to inform you [Lennar], that the
 3 Claimants hereby make a claim against you for common plumbing defects in their members’
 4 homes.”⁸ Thus, per the HOA’s NRS 40 Notices to Lennar, the “controversy between the parties”
 5 for purposes of determining whether this Court has subject matter jurisdiction is the HOA’s claim
 6 “on behalf of its members, as well as on behalf of similarly situated homeowners associations in
 7 the Las Vegas Valley,” against Lennar “for common plumbing defects in their members’ homes.”⁹
 8 At set forth below, this Court would clearly have subject matter jurisdiction over a “suit arising
 9 out of the controversy between the parties” under 28 U.S.C. §1332, pursuant to both diversity
 10 jurisdiction and under the Class Action Fairness Act (“CAFA”) and thus this Court has
 11 jurisdiction to properly enter an order compelling arbitration under §4 of the FAA.

12 **1. Diversity Jurisdiction.**

13 This Court has diversity jurisdiction over a suit arising out of the HOA’s yellow brass
 14 claim against Lennar pursuant to 28 U.S.C. §1332 because complete diversity exists between
 15 Lennar and the HOA and the amount in controversy well exceeds \$75,000.00.

16 **(a) Diversity of citizenship.**

17 If a party is a corporation, it is a citizen of both its state of incorporation and the state
 18 where it has its principal place of business. 28 U.S.C. § 1332(c)(1). A corporation’s “principal
 19 place of business” for diversity purposes is determined by the “nerve center test.” *Hertz Corp. v.*
Friend, 130 S. Ct. 1181, 1192-93 (2010). The “nerve center test” locates a corporation’s principal
 20 place of business in the state “where the corporation’s high level officers direct, control, and
 21 coordinate the corporation’s activities.” *Id.* at 1186. “[I]n practice [the nerve center] should
 22 normally be the place where the corporation maintains its headquarters – provided that the
 23 headquarters is the actual center of direction, control, and coordination . . . ” *Id.* at 1192.

24 Upon information and belief, the HOA is, and was at the time this action commenced, a
 25
 26

27 ⁷ See, HOA’s June 30, 2011 NRS 40 Notices forwarded to Greystone Nevada, LLC and U.S. Home Corporation,
 28 attached hereto as Exhibits “5” and “6,” respectively. (citing NRS 116.3102(1)(d)).

⁸ See, HOA’s June 30, 2011 Notices at p.2, ¶2.

⁹ See, HOA’s June 30, 2011 NRS 40 Notices at p.2.

citizen of Nevada. Submitted herewith is a true and correct copy of a print-out from the Nevada Secretary of State's website, which identifies the HOA (Anthem Highlands Community Association) as a Nevada non-profit corporation.¹⁰ The print-out also provides a Las Vegas, Nevada address for the HOA's officers. The HOA does not dispute that it is a citizen of Nevada.

U.S. Home Corporation is organized under the laws of Delaware and its principal place of business is in Miami, Florida.¹¹

A limited liability company is a citizen of every state of which its members are citizens. *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). Lennar is a Delaware limited liability company. Lennar’s managing and only member is Lennar Pacific Properties Management, Inc. (“Lennar Pacific”). Lennar Pacific is, and was at the time this action was commenced, a Delaware corporation headquartered in Miami, Florida. Therefore, Lennar Pacific is a citizen of Delaware and Florida, and because it is the sole member of Lennar, Lennar is also a citizen of Delaware and Florida.¹²

In summary, U.S. Home Corporation and Greystone Nevada, LLC, as a citizens of Delaware and Florida, are completely diverse from the HOA, which is a citizen of Nevada.

(b) Amount in controversy.

(i) This matter involves two single claims.

The HOA initiated the yellow brass claim by providing Lennar with two notices of constructional defects pursuant to NRS 40.645.¹³ The Notices provide that the Anthem Highlands Community Association and all similarly situated associations whom the HOA purports to represent, “hereby make a *claim* against you for common plumbing defects in their members’ homes.”¹⁴ [Emphasis added]. Thus, by the plain language of the Notices, the HOA is bringing “a claim” against Lennar, i.e., the yellow brass claim, and aggregation is not necessary.

¹⁰ See, Nevada Secretary of State Record regarding the Anthem Highlands Community Association, attached hereto as Exhibit “8.”

¹¹ See, Affidavit of Mark Sustana, Vice President and Secretary of U.S. Home Corporation, submitted herewith as Exhibit “7.”

¹² See, Affidavit of Mark Sustana, Vice President and Secretary of Lennar Pacific Properties Management, Inc.

¹³ See, HOA's June 30, 2011 Notices, attached hereto as Exhibits "5" and "6."

¹⁴ See, HOA's June 30, 2011 Notices at p.2, ¶2, attached hereto as Exhibits "5" and "6."

(ii) If the Court determines this matter involves multiple claims, the claims must be aggregated because a single party is asserting claims against a single party.

If this Court determines that the yellow brass claim is not a single claim, but instead involves multiple claims, the Court must aggregate the claims for purposes of determining the amount in controversy. This is because the because a single party, the HOA, has asserted two claims against two single parties, Greystone and U.S. Home.

The anti-aggregation rule does not apply in cases where a single party asserts two or more claims against another single party. *Snyder v. Harris*, 394 U.S. 332, 335 (1969); *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1474 (9th Cir. 1997). In *Budget Rent-A-Car*, the Ninth Circuit Court of Appeals held that the district court was required to aggregate the multiple claims at issue between single parties in order to evaluate the jurisdictional requirement. The relevant facts in *Budget Rent-A-Car* are as follows: Two individuals (“Drivers”) rented a car from Budget and were each provided with liability coverage of \$35,000 for damages arising out of “accidental harm sustained by any one person as a result of any one accident.” *Id.* at 1473. The same day, Drivers went to George and Sharon Higashiguchi’s residence, attempted to abduct their granddaughter, and assaulted the Higashiguchis causing them injuries. *Id.* Before the Higashiguiche’s filed suit for damages, Budget filed a declaratory relief action against them, among others, seeking a declaration that it was not obligated to provide coverage for the Higashiguiche’s injuries. *Id.* The Higashiguchi’s moved to dismiss for lack of subject matter jurisdiction, alleging that the amount in controversy did not exceed the then \$50,000 requirement because each of their future claims against each driver would be for the policy limits of approximately \$35,000. *Id.* The district court granted the motion , but the Ninth Circuit reversed. The Ninth Circuit stated: “A declaratory judgment plaintiff may reach the jurisdictional amount by aggregating its multiple claims against a single defendant.” *Id.* at 1474. The Court reasoned as follows:

This is not a case in which Budget, through the vehicle of a declaratory relief action is creating federal diversity jurisdiction that otherwise would not exist. If both Higashiguchis were to prevail against both [drivers] in their state tort claims, George and Sharon each could meet the amount in controversy requirement for

1 federal diversity jurisdiction by aggregating their two breach of contract claims
 2 against Budget. *Id.* at 1474.

3 The Court concluded, therefore, that each of the Higashiguchis two \$35,000 claims aggregated to
 4 \$70,000, and the amount in controversy requirement had been met. *Id.*

5 Here, the HOA is a single claimant asserting two claims against a single entities,
 6 Greystone and U.S. Home. As such, the claims against each of them must be aggregated in order
 7 to evaluate the amount in controversy requirement. *See Budget Rent-A-Car*, 109 F.3d at 1474. As
 8 in *Budget Rent-A-Car*, Lennar is not attempting to create federal diversity jurisdiction that would
 9 not otherwise exist. If the HOA (a single party) were to prevail on its yellow brass claims against
 10 Greystone and U.S. Home in a future lawsuit, the amount of the judgments in favor of the HOA
 11 would far exceed \$75,000, as discussed further below.

12 In *Lake Haven Mobile Home Owners, Inc. v. Orangeland Vistas, Inc.*, 2005 WL 1310010
 13 (M.D. Fla.), a case directly on point, the court aggregated numerous claims brought by a mobile
 14 homeowners' association on behalf of its members against the owners of a mobile home park.
 15 The court aggregated the claims in order to meet the amount in controversy requirement. The
 16 association brought a state court action against the defendants, claiming that they had increased
 17 each homeowner's rent by approximately \$15,000 without first providing the required statutory
 18 notice. *Id.* at *1. The defendants removed the case to federal court, and the association filed a
 19 motion for remand. *Id.* The court denied the motion, ruling that the defendants had properly
 20 removed the case because there was complete diversity of citizenship and the amount in
 21 controversy had been met by aggregation of the defendants' claims. *Id.* The court noted that
 22 Florida Rule of Civil Procedure 1.222, authorizes a mobile homeowners' association to "institute
 23 maintain, settle, or appeal actions or hearings in its name on behalf of all homeowners concerning
 24 matters of common interest," and concluded that "as an associational action pursuant to Fla. R.
 25 Civ. P. 1.222, the Association's aggregated claims met the required amount in controversy for a
 26 diversity action." *Id.* at *1.

27 As in *Lake Haven*, this Court should aggregate the HOA's claims against Greystone and
 28 U.S. Home, respectively, in determining the amount in controversy. Here the HOA is statutorily

authorized to bring claims on behalf of the Anthem Highlands Homeowners concerning matters of common interest. NRS 116.3102(1)(d) provides that an association may “institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units’ owners on matters affecting the common-interest community.”¹⁵ Pursuant to this statutory authority, the HOA brought two claims against Lennar on behalf of the Anthem Highlands homeowners, and purports to bring a claim on behalf of “all similarly situated” homeowners in the Las Vegas valley pursuant to NRS 40.645(4). As such, the HOA’s claims can be aggregated. *See Lake Haven* 2005 WL 1310010 at *1.

(iii) The amount in controversy exceeds \$75,000.

Whether the Court treats this matter as a single claim against Lennar, or aggregated claims, the amount in controversy far exceeds \$75,000.

As set forth above, for purposes of §4 of the FAA, subject matter jurisdiction is determined by examining whether the court would have jurisdiction over the underlying “subject matter of a suit arising out of the controversy between the parties.” Here, by way of the yellow brass claims, Lennar understands that the HOA seeks the replacement of, or monetary compensation for the replacement of, the numerous WIRSBO yellow brass plumbing components installed in Lennar homes throughout the Las Vegas valley.

Several years ago, the HOA’s counsel brought a similar civil action on behalf of homeowners seeking damages arising from yellow brass plumbing components. In *In Re Kitec Fitting Litigation*, Clark County District Court Case No. A493302, the homeowners’ expert estimated that, depending on variable repair conditions, it would cost between \$10,404 and \$23,183, per home, to replace the yellow brass plumbing components.¹⁶

Here, the Clermont, Earlstone and Glengarry communities within the Anthem Highlands Master community, which are the subject of the HOA's claim, have a total of 298 homes, 100 of which are Greystone homes (Clermont) and 198 of which are U.S. Home (Glengarry and

¹⁵ The Nevada Supreme Court has held that a “common-interest community” for purposes of NRS 116.3102(1)(d), includes the individual homes owned by an association’s members. *D.R. Horton v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457, 215 P.3d 697 (2009) (hereinafter “*First Light II*”).

¹⁶ See, Cost of Repair Report submitted by the Class Claimants in the *In re Kitec* litigation, Clark County District Court No. A493302, attached hereto as Exhibit “9.”

1 Earlstone). Lennar believes in good faith that that the *In re Kitec* cost of repair is a good faith
 2 estimate of the amount in controversy per home in this matter. Therefore, based on the HOA's
 3 counsel's own previous estimates, the amount in controversy in regards to the Lennar Anthem
 4 Highlands yellow brass claim is between \$3,100,392 and \$6,908,534, with between \$1,040,400
 5 and \$2,318,300 attributable to Greystone and between \$2,059,992 and \$4,590,234 attributable to
 6 U.S. Home. This far exceeds the \$75,000 requirement.

7 **2. Class Action Fairness Act.**

8 Alternatively, this Court would have jurisdiction over a suit arising out of the controversy
 9 between Lennar and the HOA pursuant to the Class Action Fairness ("CAFA"), 28 U.S.C.
 10 §1332(d). CAFA provides that, "[t]he district courts shall have original jurisdiction of any civil
 11 action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of
 12 interest and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a
 13 State different from any defendant . . ." *See*, 28 U.S.C. §1332(d).

14 Again, § 4 of the FAA provides that a district court may hear a Motion to compel
 15 arbitration under that section if the court "would have jurisdiction under Title 28, in a civil action
 16 ... of the subject matter of a suit arising out of the controversy between the parties." [Emphasis
 17 added]. Here, the "controversy between the parties" is the HOA's claim against Lennar "in its
 18 representative capacity on behalf of its members, as well as on behalf of all similarly situated
 19 homeowners associations in the Las Vegas Valley, and/on behalf of their members ... for common
 20 plumbing defects in their members' homes."¹⁷ The only way the HOA could pursue a suit for its
 21 yellow brass claim against Lennar as it relates to "all similarly situated homeowners associations
 22 in the Las Vegas Valley, and/on behalf of their members,"¹⁸ would be through a Rule 23 class
 23 action. This Court "would have jurisdiction" under CAFA "of the subject matter of a suit arising
 24 out of controversy between the parties:" the HOA's yellow brass claim.

25 The amount in controversy in a lawsuit involving the HOA's yellow brass claim against
 26 Lennar, as set forth within the HOA's NRS 40 Notices, would well exceed the \$5,000,000

27 ¹⁷ *See*, HOA's June 30, 2011 Notices at p.2.

28 ¹⁸ *See, Id.*

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requisite amount to satisfy CAFA.¹⁹ Here, in addition to the Clermont (developed by Greystone, 100 homes), Earlstone (U.S. Home, 98 homes) and Glengarry (U.S. Home, 100 homes) communities within the Anthem Highlands Master community, which have a total of 298 homes, the HOA's counsel has made yellow brass claims in three other Lennar communities located in the Las Vegas Valley: Fiesta Park, which was developed by Greystone and has 170 homes; Wolf Creek, developed by U.S. Home with 68 homes and Lamplight Square, developed by Greystone with 64 homes. In addition to these, U.S. Home Corporation and Greystone Nevada, LLC have respectively built at least 300 additional homes in the Las Vegas valley within the past 8 years where Wirsbo yellow brass components were likely installed.²⁰ Admittedly, the homes involved in *In Re Kitec* (which were not built by Lennar) have different floor plans from those found in Lennar communities and would, therefore, present different "variable repair conditions." However, Lennar believes in good faith that this would not result in a decrease in the bottom end of the HOA's counsels' estimated range for the cost to replace the yellow brass components. Therefore, based on the HOA's counsel's own previous estimates, the amount in controversy is at least between \$12,484,800 and \$27,819,600 for the entire Las Vegas valley (between \$6,596,136 and \$14,698,022 for Greystone and between 5,888,664 and 13,121,578 for U.S. Home). This far exceeds the \$5,000,000.00 jurisdictional requirement for CAFA. Thus, because this court would have subject matter jurisdiction "in a suit arising out of the controversy between the parties," either pursuant to diversity or CAFA, Lennar's Motion to this Court for an order compelling arbitration is proper under § 4 of the FAA.

D. THE ANTHEM HIGHLANDS HOMEOWNERS ARE BOUND BY ANY ORDERS BINDING THEIR STATUTORILY AUTHORIZED REPRESENTATIVE

The HOA's Response argues that, even though the HOA is pursuing the homeowner-members' underlying yellow brass claim on their behalves as their authorized representative under NRS 116.3102(1)(d), this Court's rulings are not binding upon them. The HOA's assertion that it can pursue the homeowners' yellow brass claims against Lennar, but Lennar cannot assert its

¹⁹ As established above, Greystone Nevada, LLC and U.S. Home Corporation are citizens of Delaware and Florida, thus both are citizens of states different than the plaintiff would be in a suit arising out of the HOA's claim – the HOA.

²⁰ See, Affidavits of Wayne Shumske, regarding Greystone and U.S. Home attached hereto as Exhibit "10."

1 defenses to said claim – i.e. enforcement of the arbitration agreements – against the HOA, is
 2 completely nonsensical.

3 **1. Joinder of the Homeowners is Not Required Under Fed. R. Civ. P. 17
 4 Where Their Statutorily Authorized Representative Has Initiated Their
 5 Claim.**

6 Joinder of the Anthem Highlands homeowners to Lennar's Motion is neither necessary nor
 7 required given that the homeowners' statutorily authorized representative, the HOA, has initiated
 8 the homeowners' yellow brass claim that is the subject of this Motion on their behalves. Federal
 9 Rule of Civil Procedure 17, which generally requires the appearance of the real party in interest to
 10 lawsuit, lists several exceptions to this general rule: "The following may sue in their own names
 11 *without joining the person for whose benefit the action is brought:* ... a party authorized by
 12 statute." [Emphasis added].

13 The HOA has asserted the yellow brass claim as its member-homeowners' statutorily
 14 authorized representative under NRS 116.3102(1)(d) and thus joinder of the homeowners for
 15 whose benefit the claim has been made is not necessary.²¹ The Nevada Supreme Court in *D.R.*
Horton v. Eighth Judicial Dist. Court (hereinafter "*First Light II*") recognized that "in the absence
 16 of an express statutory grant, an association does not have standing to bring suit on behalf of its
 17 member owners" under Rule of Civil Procedure 17. 125 Nev. 449, 455, 215 P.3d 697 (2009)
 18 citing Nev. R. Civ. P. 17.²² However, the Court in *First Light II* expressly held that "under NRS
 19 116.3102(1)(d), a homeowners' association has standing to assert constructional defect claims in a
 20 representative capacity on behalf of [its] individual units [owners]." 125 Nev. at 453. Thus, the
 21 homeowners are not indispensable to this action given that the underlying claim has been initiated
 22 by their representative, as authorized by NRS 116.3102(1)(d).

23 **2. The Anthem Highlands Homeowners Have Allowed their Statutorily
 24 Authorized Representative, the HOA to Pursue The Yellow Brass
 25 Claim.**

26 In Nevada, homeowners' associations have an express statutory grant of standing to pursue
 27 claims on behalf of their homeowner-members, for matters affecting the homeowners' individual

28 ²¹ See, HOA's June 30, 2011 NRS 40 Notices at p.2.

29 ²² Nevada's Rules of Civil Procedure are modeled after the Federal Rules and Nevada Rule 17 is substantively
 30 identical to Federal Rule 17.

1 properties, subject to the terms of the associations' CC&Rs.²³ *Id.* Subject to the terms of an
 2 association's Covenants, Conditions and Restrictions ("CC&Rs"), NRS 116.3102(1)(d) allows a
 3 homeowners' association to "[i]nstitute, defend or intervene in litigation or administrative
 4 proceedings in its own name on behalf of itself or two or more units' owners on matters affecting
 5 the common-interest community." The Nevada Supreme Court has held that a "common-interest
 6 community" for purposes of NRS 116.3102(1)(d), includes the individual homes owned by an
 7 association's members. 125 Nev. at 457.

8 The HOA here, has invoked NRS 116.3102(1)(d) to initiate the yellow brass claim against
 9 Lennar, *on behalf of* the HOA's homeowner-members. The HOA's NRS 40 Notices to Lennar
 10 state, "the Anthem Highlands Community Association ... in its representative capacity on behalf
 11 of its members (citing NRS 116.3102) ... hereby make[s] a claim against you for common defects
 12 in [its] members' homes."²⁴ [Emphasis added]. Thus, because the HOA has invoked NRS
 13 116.3102(1)(d), joinder of its homeowner-members on whose behalf the yellow brass claim is
 14 made is not necessary under Fed. R. Civ. P. 17.

15 The case relied upon by the HOA to support its argument that homeowners are "strangers"
 16 to this lawsuit and cannot be bound by orders of this Court is inapplicable as it deals with the
 17 narrow issue of whether an order denying class certification is binding upon non-party putative
 18 class members. *See*, HOA's Response at 5:2-12 quoting *Smith v. Bayer*, 131 S.Ct. 2368, 2380-81
 19 (2011). That case is irrelevant to the situation here, where the HOA has initiated its homeowner-
 20 members' yellow brass claim in a representative capacity under NRS 116.3102(1)(d) and the
 21 HOA's CC&Rs governing the relationship between the HOA and its homeowner-members. The
 22 Anthem Highlands homeowners are not putative class members, but rather are members of the
 23 HOA who have authorized the HOA to pursue the yellow brass claim on their behalves.

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 27 ²³ Under *First Light II*, non-HOA-member developers, such as Lennar, cannot challenge the adequacy of the internal
 28 procedures followed by a homeowners' association underlying the commencement of a claim. *First Light II*, 125
 Nev. at 454, 215 P.3d 697.

²⁴ *See*, HOA's June 30, 2011 Notices at p.2, citing NRS 116.3102.

1 **3. Any Defenses Lennar Has to the Homeowners' Yellow Brass Claim,
2 Can Be Asserted Against Their Statutory Representative, the HOA.**

3 Any defenses to the Anthem Highlands homeowners' yellow brass claim that Lennar has
4 against the homeowners can be asserted against the HOA, who is making the claim on their behalf.
5 Here, the yellow brass claim is subject to the terms of arbitration agreements entered into between
6 Lennar and the homeowner-HOA members whom Lennar seeks to compel by way of its Motion.²⁵
7 The fact that the HOA is not a party to the arbitration agreements makes no difference where it is
8 asserting a claim on behalf of signators. “[A] nonsignator is bound to the terms of an arbitration
9 agreement where the nonsignator’s claims are asserted solely on behalf of a signator to an
10 arbitration agreement.” *Satomi Owners Assoc. v. Satomi, LLC*, 167 Wash.2d 781, 810, 225 P.3d
11 213, 230 (2009) citing *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1380-82 (9th Cir. 1997),
12 see also, *Stanford Development Corp. v. Stanford Condominium Owners Association*, 285 S.W.3d
13 45 (Texas App. 2009)(holding that “a condominium homeowners’ association that brings suit
14 against the condominium developer on behalf of its homeowners is bound by arbitration
15 agreements in earnest money contracts between developer and the individual homeowners.”)

16 The HOA’s Response to Lennar’s Motion seems to suggest that if the terms of the arbitration
17 agreements do not allow for consolidated, class or joint arbitrations an order pursuant
18 to Lennar’s Motion would not be binding upon the HOA’s members. This argument is
19 nonsensical. The fact that the terms of the arbitration agreements do not allow for any sort of joint
20 arbitrations does not change this Court’s ability to compel the Anthem Highlands homeowners to
21 arbitration through their statutory representative for purposes of the yellow brass claim, the HOA.

22 As the Anthem Highlands homeowners’ statutorily authorized representative, the HOA
23 essentially steps into the shoes of the homeowners. *Satomi Owners Assoc. v. Satomi, LLC*, 167
24 Wash.2d 781, 810, 225 P.3d 213, 230 (2009). Although the Anthem Highlands homeowners
25 could have each individually asserted a yellow brass claim against Lennar for their respective
26 residences, the homeowners apparently agreed to allow their HOA to pursue their claim on their
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²⁵ See, Exhibits “D,” “E” and “F” to Affidavit of Heather R. Thompson, attached to Lennar’s Motion as Exhibit “2.”

²⁶ behalves and thus must be bound by any order flowing from this representation.

E. THE HOA'S ARGUMENT THAT IT HAS NOT MADE A "CLAIM" AGAINST LENNAR IS COMPLETELY VOID OF REASON.

Remarkably, the HOA’s Response argues that the HOA has not made a claim against Lennar.²⁷ The HOA argues that “[a] ‘claim’ arises, if at all, only after Chapter 40 is unsuccessfully exhausted and a homeowner or homeowners’ association decides to file a lawsuit asserting causes of action to redress the remaining construction defects.”²⁸ Not only is this argument contrary to the clear provisions of the arbitration agreements and NRS 40.600, *et seq.* (“NRS 40”), it completely defies logic and the most elementary principles of the law.

1. The HOA's NRS 40 Notice Triggers the Application of the Arbitration Agreements.

A “dispute” for purposes of triggering the terms of the arbitration agreements at issue here is defined in Clermont Agreement 1 as “any claim, dispute or disagreement of any nature whatsoever regarding the *Home*, including without limitation any dispute of any nature whatsoever, arising from, under, or connected in any way with the construction or performance of the *Home* . . .”²⁹ Thus, the HOA’s NRS 40 Notices, stating that the HOA acting under NRS 116.3102(1)(d), “hereby make[s] a claim against [Lennar] for common plumbing defects in [its] members’ homes,”³⁰ fall squarely within the definition of a “dispute” triggering application of the arbitration provisions of Clermont Agreement 1.

Clermont Agreement 2 and the Earlstone and Glengarry Agreements similarly state that “disputes” triggering the arbitration provisions “(whether contract, warranty, tort, statutory or otherwise), shall include … any and all controversies, disputes or claims … relating to personal injury or property damage alleged to have been sustained by Buyer … or other occupants of the Property.”³¹ Thus, the HOA’s NRS 40 Notice claiming defects within the Anthem Highlands

²⁶ Lennar has no knowledge regarding the internal procedures which the HOA and its homeowners followed to make this determination, nor can Lennar, as a non- HOA member, challenge the adequacy of such procedures. See, *First Light II*, 125 Nev. at 454, 215 P.3d 697.

²⁷ See, HOA's Response (#12) at 6:3 – 7:4.

²⁸ See, HOA's Response (#12) at 6:17-20.

²⁹ See Exhibit "A" to the Affidavit of Heather R. Thompson, attached to Lennar's Motion to Compel as Exhibit "2."

³⁰ See, HOA's June 30, 2011 NRS 40 Notices to Lennar at p.2.

³¹ See, Exhibit “B” and “C” to the Affidavit of Heather R. Thompson, attached to Lennar’s Motion to Compel (#7) as Exhibit “2.”

1 homes also triggers the application of these agreements.

2 **2. The HOA's NRS 40 Notice Explicitly States that the HOA is Making A
3 "Claim" Against Lennar.**

4 The HOA's proclaimed ignorance of the difference between a claim – an assertion of a
5 legal right - and a civil lawsuit is unconvincing in light of the fact that the HOA's NRS 40
6 Notices specifically state that the HOA is making a "claim" against Lennar by virtue of said
7 Notices. The Notices states that "[t]he purpose of the Notice is to inform you that the [HOA]
8 hereby makes[s] a claimant against you [Lennar] for common plumbing defects in [its] members'
9 homes."³² The HOA's understanding of NRS 40 is further evidenced by the following statement
10 from the HOA's NRS 40 Notice to Lennar: "NRS 40.645(2) requires that before commencing
11 litigation against you or your company, the Claimants must provide you with written notice
12 specifying in reasonable detail the construction defects for which you may be held liable pursuant
13 to NRS 40.640."³³ Thus, the HOA's argument that it has not made a "claim" against Lennar on
14 behalf of its homeowner-members is clearly a disingenuous attempt to keep the homeowners'
15 yellow brass claims out of arbitration.

16 **3. The HOA's NRS 40 Notice Constitutes A Claim and Has Immediate
17 Legal Implications to the Anthem Highlands Homeowners.**

18 NRS 40 is a mandatory pre-litigation *claim*-resolution process with which a "Claimant"
19 must comply before it can file a *civil lawsuit* to recover damages stemming from a construction
20 defect. *See*, NRS 40.645, NRS 40.647. NRS 40.610 defines "Claimant" for purposes of NRS 40
21 as "[a]n owner of a residence or appurtenance, [a] representative of a homeowner's association
22 that is responsible for a residence or appurtenance and is acting within the scope of the
23 representative's duties pursuant to chapter 116 or 117 of NRS; or [e]ach owner of a residence or
24 appurtenance to whom a notice applies pursuant to subsection 4 of NRS 40.645" (allowing one
25 claimant to send one NRS 40 Notice of "similarly situated" residences within the community).
26 NRS 40 makes it clear that a "Claimant" acting under the authority of NRS 40, is making a
27 construction defect "claim" against a developer. In this regard, NRS 40.645 provides that "before
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³² *See*, HOA's June 30, 2011 NRS 40 Notices to Lennar at p.2.

³³ *Id.* at p.3.

1 a *claimant* commences an action or amends a complaint to add a cause of action for a
 2 constructional defect against a contractor ... the *claimant* ... Must give written notice [to the
 3 contractor] ... [s]pecify[ing] in reasonable detail the defects or any damages or injuries to each
 4 residence or appurtenance *that is the subject of the claim.*" [Emphasis added].

5 Contrary to the HOA's position, its assertion of the yellow brass claim against Lennar has
 6 real and immediate legal implications to the homeowners that the HOA represents. NRS 40.688
 7 provides that "If a claimant attempts to sell a residence that is or has been the subject of a *claim*
 8 governed by NRS 40.600 to 40.695, inclusive, the claimant shall disclose, in writing, to any
 9 prospective purchaser of the residence, ... [a]ll notices given by the claimant to the contractor
 10 pursuant to NRS 40.600 to 40.695, inclusive, that are related to the residence" Thus, the
 11 homeowners within the Anthem Highlands Community, whose claim the HOA is asserting, will
 12 have to disclose the yellow brass claim to any prospective purchaser because it affects their
 13 residence.³⁴ Further, the NRS 40 has real and immediate legal implications to Lennar, who is
 14 required to forward the notice to its implicated trade partners pursuant to NRS 40.646, otherwise,
 15 Lennar would be barred from later commencing an action against such trade partner to recover for
 16 the claim that is the subject of the NRS 40 notice. Thus the HOA's assertion of the homeowner-
 17 members' yellow brass claim has real and binding legal implications.

18 **4. NRS 40 Cannot Delay An Order Compelling Arbitration.**

19 The HOA's "limited" Response to Lennar's Motion seems to suggest that an order from
 20 this Court compelling arbitration of the yellow brass claim is not appropriate unless and until the
 21 NRS 40 pre-litigation inspection and repair process is completed.³⁵ First, Lennar maintains that
 22 the pre-arbitration inspection and mediation procedures set forth within the arbitration agreements
 23 at issue here are consistent with the pre-litigation procedures of NRS 40. There is no reason an
 24 arbitrator could not oversee the pre-arbitration inspection and mediation process.

25 Further, the HOA's argument that the NRS 40 process must be completed before an order

26 ³⁴ NRS 40.688(2) further provides that "[b]efore taking any action on a claim pursuant to NRS 40.600 to 40.695,
 27 inclusive, the attorney for a claimant shall notify the claimant in writing of the provisions of this section."

28 ³⁵ See, HOA's Limited Response (#12) at 6:5-10 (" 'NRS Chapter 40's provisions apply to "any" construction defect
 claims and the chapter's provisions 'prevail over any conflicting law otherwise applicable.'")

1 compelling arbitration is proper is ironic given that counsel for the HOA has previously asserted
 2 that the NRS 40 process had been waived by Lennar as to the Anthem Highlands claim due to
 3 Lennar's "disputed response" to the NRS 40 Notices. On August 17, 2011, Lennar forwarded
 4 letters to the HOA's counsel setting forth the deficiencies within the HOA's NRS 40 Notices and
 5 further advising counsel that the dispute was subject to arbitration agreements with the HOA's
 6 homeowner-members.³⁶ Counsel for the HOA responded with two identical letters dated August
 7 26, 2011, which stated that "[b]ased on you clients' disputed response to the claimant's NRS
 8 Chatper 40 notice, please us know if you are authorized to accept service of a legal action on
 9 behalf of your clients to resolve this matter and have this claims resolved on the merits and in the
 10 manner that preserves our clients speedy access to justice without unreasonable waste of time or
 11 resource."³⁷

12 Finally, NRS 40 cannot be read to pre-empt, delay or otherwise conflict with the
 13 procedures set forth within the arbitration agreements. *See, Preston v. Ferrer*, 552 U.S. 346, 128
 14 S.Ct. 978 (2008)(holding that "when parties agree to arbitrate ... [the] Federal Arbitration Act
 15 supersedes state laws lodging primary jurisdiction in another forum, whether judicial or
 16 administrative.") The pre-litigation procedures of NRS 40 cannot be interpreted as an obstruction
 17 to the parties agreement to resolve all "disputes," as defined therein, pursuant to the procedures set
 18 forth within the arbitration agreements, and an order compelling the parties to arbitrate the yellow
 19 brass claim "in the manner provided for in such agreement[s]," including the pre-arbitration
 20 inspection and mediation procedures set forth therein, is warranted. *See, Id.* at 353 ("The FAA's
 21 displacement of conflicting state law is 'now well established,' and has been repeatedly
 22 reaffirmed.") quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834
 23 (1995); *see also*, 9 U.S.C.A. §4 (requiring an "order directing the parties to proceed to arbitration
 24 in accordance with the terms of such agreement.")

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³⁶ See, August 17, 2011 Letters to J. Carraway from Payne & Fears on behalf of U.S. Home Corporation and
 27 Greystone Nevada, LLC, attached hereto as exhibits "11" and "12," respectively.
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³⁷ See, August 26, 2011 Letters from Terry Riedy to Payne & Fears on behalf of U.S. Home Corporation and
 Greystone Nevada, LLC, attached hereto as Exhibits "13" and "14," respectively.

IV. CONCLUSION

For all of the foregoing reasons, Greystone and U.S. Home respectfully request that this Honorable Court issue an order compelling the original homeowners-members of the HOA within the Clermont, Earlstone and Glengarry Communities, who are the subject of this Motion, to arbitrate their yellow brass claims pursuant to the terms of the arbitration agreements and the Federal Arbitration Act.

DATED: November 14, 2011 PAYNE & FEARS LLP

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By:/s/ Gregory H. King

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CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2011, I served a true and correct copy of the above and foregoing, **GREYSTONE NEVADA, LLC AND U.S. HOME CORPORATION'S REPLY IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION** was made this date by electronic transmission through the court's CM/ECF program.

/s/ Nancy Babas.

Nancy Babas

An Employee of PAYNE & FEARS LLP